84-13

Case Number:

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In the Supreme Court of the United States

October Term, 1983

CHARLES HOMER ROBERTSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an informant who has been supplied with a casette tape recorder by the Federal Authorities and sent out into the field with instructions to record what conversations he could with your petitioner and other and who is operating in the field solely on his own without any connection with or control by any law enforcement officer can be a person acting under color of law so as to come within the exception to the Wire Tap Statute provided by 18 USC, §2511 (2) (c) making his recordings of telephone conversations admissible in evidence against petitioner.

PARTIES TO THE PROCEEDING

All Parties to the Proceeding are listed in the caption of this case.

TABLE OF CONTENTS AND AUTHORITIES

PAGE

TABLE OF CONTENTS

Question Presented for Review 1
Parties to The Proceeding 2
Official Reports 4
Grounds Which Jurisdiction of The Superme Court Is Invoked 5
Statutes Involved 6
Statement of The Case 7,8
Argument 9-14
Certificate of Service 16
Appendix 16

CASES

Benford vs. American Broadcasting Companies, Inc., 502 F. Supp. 1159 10,13
Craig, 572 F.2 455 10
Hall, 536, F. Supp. 313 10
Hodges, 539 F.2 898 10
Mendoza, 574 F.2 1373 10
Meredith vs. Gavin, 446 F2 794 10
Moore vs. Telfon, 589 F.2 959 10
Ransom, 515 F.2 885 10
Rich, 518 F.2 980 10
Salzberry, 662 F.2 738 10
Shields, 675 F.2 1152 10
Skipworth, 697 F.2 281 10
Tousant, 619 F.2 810 10

STATUTES

Title 18 U.S.C. § 2511 (2) (c) (d) 6
Title 21 U.S.C. §841 (a) (1) 7
Title 21 U.S.C. §841 (b) (6) 7
Title 21 U.S.C. §952 (a) 7

OFFICIAL REPORTS

Robertson vs. United States, F.2 . (5 Cir. 1984)

GROUNDS WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED

Your petitioner was convicted in the United States District Court for the Western District of Louisiana and his conviction was appealed to the United States Court of Appeals for the Fifth Circuit.

The Fifth Circuit affirmed the conviction on March 15, 1984.

A timely filed Petition for Rehearing was denied by an Order of the Fifth Circuit entered April 18, 1984.

A copy of the Opinion of the Fifth Circuit and of the Order on Rehearing is included in the Appendix to this Petition.

Jurisdiction is asserted in this Court pursuant to the provisions of Title 28 USC, §1254 (1).

STATUTES INVOLVED

Title 18 USC, §2511 (2):

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of commiting any other injurious act.

STATEMENT OF THE CASE

Petitioner was indicted in the United States District Court for the Western District of Louisiana, charged with one count of conspiracy to import marijuana, contrary to the provisions of Title 21 U.S.C. §952 (a) and one count of conspiracy to possess marijuana with the intention to distribute it in violation of Title 21 U.S.C. §841 (a) (1) and 841 (b) (6).

Petitioner was found guilty on each count by a jury. The jury deliberated for seven (7) hours and returned its verdict only after returning near the end of its deliberations to request that certain tape recordings of telephone conversations admitted into evidence in the trial be replayed for them.

Petitioner objected to the admission of the tapes in the trial court on the basis that they did not come within any of the exceptions to the Federal Wiretap Act.

The tapes were made under the following circumstances. An investigation had beeen begun into purported criminal activities in the State of Louisiana. Certain persons who were charged with state offenses in Louisiana began cooperating with the authorities. The D.E.A. and F.B.I. were brought into the case. More informants were recruited. The authorities furnished the informants with standard portable cassette tape recorders and the informants were told to record such telephone conversations as they could with persons allegedly involved in criminal activities. Pursuant to these instructions, several of the informants recorded phone conversations between themselves and the Petitioner and his alleged co-conspirator. At the time the tape recordings complained of were made, the informants were out in the field. They had at that time no

contact whatsoever with any law enforcement officer. No law enforcement officer was in any sense in control of the actual recordings either physically or electronically. In fact, a substantial portion of the tape recordings made were of such poor quality that they could not and cannot be audited. Those that were able to be heard were introduced in evidence at the trial. In each of those conversations, the telephone call recorded was initiated by the informant and not by the Petitioner. In return for their services in the case, the informants were promised that no Federal prosecution would be instituted against them.

At the trial, and in the Court of Appeals, Petitioner contended that the informants could not be persons acting under color of law to come within that exception to the Federal Wiretap Statute and that the recordings were clearly made for the purpose of committing an injurious (albeit not criminal or tortious) act and therefore did not come within the exception to the Federal Wiretap Statute for recordings made by persons not acting under the color of law if made for defensive purposes.

These contentions were rejected by both the trial court and the appellate court in the Opinion to which certiorari is here sought giving rise to this Petition.

ARGUMENT

An informant acting alone out in the field cannot be a person acting under color of law for the purpose of making his tape recordings admissible in evidence.

The applicable statutes are brief and are recapitulated here for the Court's convenience:

Title 18 USC, §2511 (2):

> (c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.
>
> (d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of commiting any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

Cases considering the statutes fall into distinct categories:

Class A. Cases in which the interception was performed by the law enforcement officer either by directly recording his own conversations with another party, or by recording the conversations of an informant with another party with the informant's consent. See:

Mendoza, 574 F.2 1373
Rich, 518 F.2 980
Craig, 573 F.2 455
Ransom, 515 F.2 885
Hodges, 539 F.2 898

Class B. Cases where the question of whether the person recording was acting under color of law was not presented, or where color of law in that person was conceded and the case turned on other issues such as whether consent was freely given or was enforced. See:

Shields, 675 F.2 1152
Salzberry, 662 F.2 738
Skipworth, 697 F.2 281

Class C. Cases where the Court approved admission in evidence of recordings made by the informant alone relying on the Class A cases cited above and reciting those cases as authority without discussing the distinction between recordings made by the agent and those made by the informant or setting forth any reasoning to support the holding. See:

Tousant, 619 F.2 810
Hall, 536 F. Supp. 313

Class D. Civil cases considering potential liability for damages under the statute. See:

Meredith vs. Gavin, 446 F.2 794
Moore vs. Telfon, 589 F.2 959
Benford vs. American Broadcasting Companies, Inc., 502 F. Supp. 1159

We respectfully suggest that all of the cases decided under the statute can be classified under one of the categories described.

The legislative history of the wire tap statute indicates that congress was clearly concerned with protecting rights of privacy and did so across the board, except as specifically authorized in the statute by exceptions to the broad prohibitions created therein. The two exceptions which are material to this case must be read in para materia.

They clearly establish that Congress intended to permit the interception of communications in two separate sets of circumstances; first - where the recording is actually made by a person acting under color of law, either where he is a party to the communication, or one of the parties has given his prior consent, and, secondly - by a person not acting under color of law provided that he makes the recording for defensive purposes and not for the purpose of committing any criminal or tortious act in violation of federal or State constitution or law or for the purpose of committing any other injurious act.

In the case at bar, the recordings obviously were not made for defensive purposes. They were made by informants cooperating with the government for the purpose of putting your Petitioner and others in jail and securing for themselves beneficial treatment from the government. The recordings were, therefore, made for the purpose of committing an act which, while it may not have been criminal or tortious, was certainly injurious.

In the case at bar, the recording were clearly not made by any person even asserting to act as a law enforcement officer. No agent of any kind was connected with the recordings. In fact, the only government contact of any kind with the recordings was that the cassette recorders were furnished the informants by the government and they were given instructions to record if

they could pursuant to which they went out in the field and called your Petitioner and others for the purpose of taping their conversations.

We do not suggest, as the Court of Appeals did in its Opinion, that the recording must be made in the presence of an officer acting under color of law. To the contrary, we suggested both in our briefs and in oral argument that control of the recordings might very well be exercised electronically by an officer located many miles away. We freely concede that what technology provides, the government may take advantage of within the confines of the statutory exception. However, we assert that the purpose of the statutory structure was to insure that recordings other than those made for defensive purposes would be made by a person who was acting under color of law and who was accountable for his actions under the standards applicable to such persons.

The Court of Appeals decision validates this conviction by holding that the informant is a person acting under color of law. We suggest that that is repugnant to both the statute and common sense.

We urge that the correct view was set out in *Benford, supra,* where the Court states in pertinent part:

> *"The protection afforded by the Federal Eavesdropping Statute was not meant to be co-extensive with Fourth Amendment protection. As a result, the intent of the legislature is not frustrated by requiring the party conducting electronic surveillance to meet a higher standard under the statute.*
>
> *The legislative history of the act indicates that congress intended that a person's reasonable exception of privacy was to be determined on a case basis, taking into*

consideration the particular facts and circumstances of each case . . .

As its second ground for dismissal of this count, ABC asserts that because it was acting in concert with the congressional defendants, it was acting under the "color of law" and, therefore, exempt under §2511 (2)(c). Again, the court is not persuaded.

The legislative history of the act makes it clear that the protection of an individual's privacy was the overriding congressional concern. See Gelbard vs. United States, 408 US 41, 92 S. Ct. 2357, 2361, 33 L. Ed. [2] *279 (1972). Extending protection to private individuals acting in concert with government officials, when their purpose is self service, thwarts this primary congressional objective of protecting individual privacy. To be afforded the protection of §2511 (2)(c), therefore, ABC would at least have to show that its only purpose in taping the meeting was to aid the congressional subcommittee."*

The cases, as they have developed in the various circuits, have developed a series of ruling in this area which emasculate the purpose of the statute and are consistent with neither reason nor experience.

Petitioner suggests further that the implications of this case are far broader than the specific holding. If an informant acting alone out in the field is a person acting under color of law, then he is such a person whether or not he had a tape recorder in his hand. He becomes such a person for the purposes of the Federal Tort Claims Act and he becomes such a person in determining his accountability for compliance with the requirements of law respecting the conduct of criminal cases, including the giving of pre-trial warnings, entrapments and the affording of counsel to Defendants or potential

Defendants. Presumably, there are many other areas as well where these informants will now come within the ambit of the rules applicable to law enforcement officers acting under color of law pursuing the investigation of their cases.

We suggest that Congress never meant to create an army of informants acting presumably under the cloak of law recording whom they please, what they please without any control or real accountability. To so hold means that by the casual instruction of a law enforcement officer, people who constitute the sleeziest elements of society are empowered to do what no other citizen who is not a law enforcement officer can do.

We respectfully suggest that this certiorati ought be granted and the application of this statute ought to be reviewed and defined by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed to the Honorable Dosite H. Perkins, Assistant U.S. Attorney, 3B12 Federal Building, United States Courthouse, 500 Fannin Street, Shreveport, Louisiana 71101, this 8 day of June, 1984.

SHALLE STEPHEN FINE

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 83-4354

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES H. ROBERTSON,
Defendant-Appellant.

Appeal from the United Staes District Court for the Western District of Louisiana

(MARCH 15, 1984)

Before BROWN, GEE, and WILLIAMS, Circuit Judges.
GEE, Circuit Judge:

Defendant Charles Robertson was convicted by a jury of one count of conspiracy to import marijuana and of one count of conspiracy to possess marijuana with intent to distribute it. On appeal, he claims (1) that the district court erred in admitting certain tape recordings into evidence, (2) that the district court erred in admitting the hearsay statements of coconspirators, and (3) that there was a material variance between the indictment and the evidence. Finding no merit in these contentions, we affirm.

I

Robertson was involved in a conspiracy to smuggle marijuana into the United States from Colombia. Several meetings among the conspirators were held at Robertson's house in Miami, Florida to plan the operation. It was determined that Johnnie Wilson would obtain a boat and would be in charge of unloading the marijuana. Robert Bosarge, Mitchell Bates and Herman Reed would take the boat to Colombia to pick up the marijuana. Robertson and David McCain would finance the operation.

Wilson obtained a boat, the SURPRISE, from Wilson Acosta of Cameron, Louisiana. He told Acosta that he would buy the boat from him out of the proceeds of the first load of marijuana.

In mid-1981, the SURPRISE sailed to Panama. The crew met McCain there and McCain explained to them whom to contact in Colombia. On their first trip to Colombia, the Colombians refused to load the SURPRISE and the crew was forced to return to Panama. On their second trip, uniformed Colombian police seized the boat and threatened to kill the crew if $150,000 was not paid to them. Although the money was never paid, the crew was released after a few months and they returned to the United States. The Colombians kept the SURPRISE.

During this time, Acosta was not informed of the problems the crew was having in Colombia. Thus, when several weeks had passed without the return of the SURPRISE, he reported to the police that his boat had been stolen. In the course of investigating this alleged theft, the Cameron Parish Sheriff's Department stumbled onto the smuggling conspiracy and called in the federal authorities. Bosarge and Wilson agreed to tape their telephone conversations with McCain and Robertson and to

turn the tapes over to the Drug Enforcement Agency and the United States Customs Office. These tapes reveal plans for future trips into Colombia to obtain marijuana.

The jury convicted Robertson of conspiracy to import marijuana and conspiracy to possess marijuana with intent to distribute. 1/ The district court denied a motion by Robertson for a new trial. 562 F.Supp. 463 (W.D. La. 1983).

II

Robertson argues that the district court erred in admitting the taped telephone conversations. He relies on 18 U.S.C. §2518 (10)(a) (Supp. V. 1981), which provides that unlawfully intercepted wire or oral communications should be suppressed in federal court proceedings. It is not unlawful, however, for a person acting under color of law to intercept a wire or oral communications where such person is a party to the communication. 18 U.S.C. § 2511 (2)(c) (1976). Robertson maintains that Bosarge and Wilson were not acting under color of law when they taped the phone conversations.

Courts have repeatedly held that informants who record private conversations at the direction of government investigators are acting under color of law for purposes of § 2511 (2)(c). *United States v. Shields* 675 F. 2d 1152, 1156-57 (11th Cir.), *cert. denied,* 103 S.Ct. 373 (1982); *United States v. Tousant,* 619 F. 2d 810, 813 (9th Cir. 1980); *United States v. Craig,* 573 F.2d 455, 476 (7th Cir. 1977),, *cert. denied,* 439 U.S. 820 (1978); *United States v. Marcello,* 508 F.Supp. 586, 601 (E.D. La. 1981). Here,

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1/ McCain, the only other conspirator named and indicted on federal counts, failed to appear for arraignment. Bosarge, Reed, Acosta, Wilson and Bates each pled guilty to a conspiracy charge in state court.

the government agents gave recording equipment to Wilson and Bosarge, explained how to use the devices, and told them whom to tape. Robertson argues that this is insufficient, maintaining that the informant must be in the presence of the government agent during the taping to establish color of law. Courts have held on several ocassions, however, that taped conversations would be considered lawfully intercepted within the meaning of § 2511 (2) (c), even when such conversations were taped by informers outside the presence of government agents. *See, e.g., United States v. Skipworth,* 697 F.2d 281, 283 (10th Cir. 1983); *Unites States v. Salisbury,* 662 F.2d 738, 739-40 (11th Cir. 1981), *cert. denied,* 457 U.S. 1107 (1982); *United States v. Mendoza,* 574 F.2d 1373, 1377-78 (5th Cir.), *cert. denied,* 439 U.S. 988 (1978); *United States v. Hall,* 536 F.2d 313, 327 (10th Cir.), *cert. denied,* 429 U.S. 919 (1976). We hold, then, that Bosarge and Wilson acted under color of law when they taped their conversations with McCain and Robertson. Consequently, their tapes were lawfully made under § (2511 (2) (c), and the district court did not err in admitting them into evidence.

Robertson argues that there was insufficient independent evidence of a conspiracy to allow the admission of hearsay statements of coconspirators. Robertson moved at the end of trial to supress those statements, but the district court found that there was ample independent evidence of a conspiracy to support their admission.

In order for a district court to admit hearsay statements of coconspirators, it must determine as a factual matter that the prosecution has shown by a preponderance of the evidence independent of the statements themselves (1) that a conspiracy existed, (2) that the coconspirators and the defendant were members of

the conspiracy, and (3) that the statements were made during the course and in furtherance of the conspiracy. *United States v. James,* 590 F.2d 575, 582 (5th Cir.), *cert. denied,* 442 U.S. 917 (1979).

We find that a substantial independent evidence of a conspiracy was present here. Such evidence included:

(1) Bosarge's testimony that he met with Robertson and other at Robertson's house to discuss plans for smuggling marijuana,

(2) Bates' testimony that he met with Robertson after the failed venture to Colombia,

(3) Wilson's testimony that he met with Robertson and others at Robertson's house to discuss locating a boat in order to smuggle marijuana,

(4) tape recordings of phone calls between Robertson, Bosarge and Wilson concerning importing marijuana and obtaining a boat,

(5) telephone records of Wilson and Bosarge,

(6) telegraphic money orders from McCain to Wilson,

(7) a letter from Robertson to Wilson.

Since a conspiracy was established by a preponderance of the evidence, the district court did not err in admitting the hearsay statements of coconspirators made in furtherance of the conspiracy.

III

Robertson alleges that the government charged one continuing conspiracy but proved two separate conspiracies -- the first ending when the SURPRISE was confiscated by the Colombians and the second beginning months later. This variance, Robertson maintains, sufficiently prejudices him so as to require a new trial.

A material variance between the indictment and the government's evidence is created by proof of multiple conspiracies under an indictment alleging a single conspiracy. *United States v. Sutherland,* 656 F.2d 1181, 1189 (5th Cir. 1981), *cert. denied,* 455 U.S. 949 (1982). If such a variance is present, a new trial is required only when the substantial rights of the defendant have been affected. *United States v. Tilton,* 610 F.2d 302, 307 (5th Cir. 1980). The principal factors that this Court examines in resolving the issue of a prejudicial variance are the existence of a common goal, the nature of the scheme, and an overlapping of participants in the various dealings. *Id.*

The goal of the instant conspiracy was to smuggle marijuana into the United States. The nature of the scheme was to use a boat to facilitate the importation The participants in the conspiracy remained the same before and after the SURPRISE was confiscated. Thus, the record makes clear that this was a continuing conspiracy and that there was no variance between the indictment and the proof.

Even if there was a variance, however, it did not affect Robertson's substantial rights. If the government proves multiple conspiracies and a defendant's involvement in at least one of them, then there is no variance affecting the defendant's substantial rights. *United States v. L'Hoste,* 609 F.2d 796, 801 (5th Cir.), *cert. denied,* 449 U.S. 833 (1980); *United States v.. Wayman,* 510 F.2d 1020, 1025 (5th Cir.), *cert. denied,* 423 U.S. 846 (1975). Here, even if the government proved two conspiracies, one before and one after the loss of the SURPRISE, it also proved Robertson's involvement in both.

Thus, because we find Robertson's contentions on appeal to be without merit, we affirm his conviction on both counts.

AFFIRMED

IN THE UNITED STATES COURT OF APPEALS

For the Fifth Circuit

NO. 83-4354

UNITED STATES OF AMERICA

Plantiff-Apelle

versus

CHARLES H. ROBERTSON,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

ON PETITION FOR REHEARING

(APRIL 18, 1984)

Before BROWN, GEE and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge